

HONORABLE JAMES L. ROBART

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MONTY J. BOOTH, ATTORNEY AT LAW,
P.S., a Washington corporation, individually and
on behalf of a class of Washington businesses
similarly situated,

Plaintiff,

vs.

APPSTACK, INC., a Delaware corporation;
STEVE ESPINOSA, individually; and JOHN
ZDANOWSKI, individually,

Defendants.

NO. 2:13-cv-01533-JLR

**PLAINTIFF'S MOTION FOR CLASS
CERTIFICATION**

Noted for Consideration: 12/19/2014

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Defendants Appstack, Inc. (“Appstack”), Steve Espinosa, and John Zdanowski (together “Defendants”) systematically violated the Washington Dialing and Answering Device statute (“WADAD”) and the Washington Consumer Protection Act (“WCPA”) by inundating thousands of Washington small businesses with 69,130 unsolicited robocalls in an attempt to improve sales of its advertising platform. Over the course of two months, Plaintiff Monty Booth received at least seventeen of these commercial solicitations at his place of business. Before he received these calls, Booth had no other interaction with Defendants.

Defendants also placed over 600,000 robocalls to cellular telephones nationwide without consent, violating the Telephone Consumer Protection Act (“TCPA”). Proposed plaintiffs Ricardo Macarenas and Christopher Gregory received numerous unwanted robocalls to their cellular telephones in 2013. Like Plaintiff Booth, Macarenas and Gregory had never done business with Defendants and did not consent to receive these unwanted robocalls.¹ Messrs. Booth, Macarenas, and Gregory are not alone — Defendants’ deposition testimony, discovery responses, and data received from third-party service providers reveal that 11,192 Washington small business owners and 90,163 cellular telephone owners nationwide received Defendants’ relentless and unlawful automated solicitations.

Plaintiffs² seek to have this case certified as a class action pursuant to Fed. R. Civ. P. 23(b)(3) so that the claims of hundreds of thousands of class members may be resolved in one fair and efficient proceeding. Certification is appropriate because there are numerous questions of law and fact common to all proposed class members that predominate over any individualized issues. Moreover, Plaintiffs’ claims and the claims of the proposed class

¹ Plaintiffs Macarenas and Gregory seek to join this lawsuit as named plaintiffs to represent both the WADAD and TCPA classes. *See* Plaintiff’s Motion for Leave to Amend Complaint to Add Plaintiffs Macarenas and Gregory and a TCPA Claim.

² Plaintiff will use “Plaintiffs” throughout this brief to refer to Mr. Booth, Mr. Macarenas, and Mr. Gregory, however, Plaintiff acknowledges that this Court has not yet allowed Mr. Macarenas and Mr. Gregory to join the lawsuit to represent the TCPA class.

1 members arise out of a common nucleus of operative facts: Defendants’ unlawful marketing
2 practices.

3 For these reasons, Plaintiffs respectfully request that the Court certify the case as a class
4 action; appoint Monty Booth, Ricardo Macarenas, and Christopher Gregory as the class
5 representatives for the WADAD class; appoint Mr. Macarenas and Mr. Gregory as the class
6 representatives for the TCPA class, appoint Terrell Marshall Daudt & Willie PLLC (“TMDW”)
7 and Dan Gallagher as class counsel, and authorize sending notice to the classes.

8 II. STATEMENT OF FACTS

9 A. Defendants Sold “Mobile Advertising Solutions” to Small Businesses

10 Defendants Stephen Espinosa, John Zdanowski, and AppStack, Inc. sold a “mobile
11 marketing solution” to small businesses. Ex. 1 at 20:15 – 21:10; Ex. 2 at 19:20 – 20:22.
12 Defendants created “mobile websites,” which were websites “optimized” for use with mobile
13 devices like cell phones. *See* Ex. 1 at 21:4–10 (“So if you were to take a regular old website
14 and put it on your mobile device, it wouldn’t look very good. We would provide [small
15 businesses] with a website that was optimized for that screen”). Defendants then created an
16 advertising campaign for their customers called “Ad Words” that had the “goal of driving
17 customers to the small business through phone calls.” *Id.* at 20:17 – 21:3.

18 Defendants Espinosa and Zdanowski founded Appstack in June 2011. Ex. 2 at 18:21 –
19 19:3. Defendant Espinosa served as Appstack’s Chief Executive Officer and Defendant
20 Zdanowski served as Appstack’s CFO. Ex. 2 at 17:10–11; 44:6–18. According to Appstack’s
21 former chief operations manager Peter Ricci, Appstack’s sales division, which ran Appstack’s
22 telemarketing efforts, reported directly to Espinosa. Ex. 1 at 32:8 – 34:16. Nathan Moore, who
23 served as “operations manager” at Appstack, confirmed that Espinosa made the “final
24 decisions” regarding Appstack’s marketing. Ex. 2 at 43:17 – 44:18.

25 Defendant Zdanowski also was involved in marketing decisions, albeit on a higher
26 level. According to Mr. Moore, Zdanowski “weighed in” on marketing decisions and “had a
27

1 role of sure, go ahead. Or go ahead and do it. It sounds like a good idea. It is not a good idea,
 2 that kind of role.” Ex. 2 at 43:17 – 44:18. Zdanowski reviewed and approved the contract that
 3 Defendants entered into with “inContact,” the vendor that Defendants retained to place
 4 robocalls to potential clients. Ex. 3 at 54489; Ex. 4. He also reviewed and authorized payment
 5 of the inContact invoices and used his personal credit card to pay these invoices. *See* Ex. 1 at
 6 46:19–21; Ex. 5 at 54455.

7 According to Mr. Ricci, Defendants Espinosa and Zdanowski both were involved in
 8 conversations regarding Appstack’s compliance with the TCPA and analogous state laws. Ex.
 9 1 at 33:2–17. Defendants’ records show that Zdanowski was well aware of the risks associated
 10 with failing to comply with telemarketing laws. Ex. 6 at 54525. Both Zdanowski and Espinosa
 11 were copied on emails regarding complaints relating to their telemarketing practices, including
 12 the use of an autodialer and prerecorded voice messages. *See* Ex. 7 (discussing complaints
 13 regarding automated calls); Ex. 1 at 84:15 – 85:1 (confirming that both Espinosa and
 14 Zdanowski were on the email distribution list entitled leadership@appstack.com).

15 **B. Defendants Placed Millions of Unsolicited Robocalls Advertising Their Services to**
 16 **Potential Customers**

17 1. Defendants Used an Automatic Dialing and Announcing Device to Place the
 18 Robocalls

19 In March 2013, Defendants started using an automatic dialing and announcing device
 20 (“the dialer”) to robocall their primary marketing target—small businesses. Ex. 8; Ex. 9 at
 21 8:20–24 (acknowledging that calls were made “for marketing purposes to promote Appstack’s
 22 product”); Ex. 10 at 5 (admitting that they used an automatic dialing and announcing device to
 23 promote its products and services); Ex. 4 at 54444 (stating that the dialer is “clearly working”
 24 because Appstack has increased sales from 34 in a week to 61 while using less staff).
 25 Defendants contracted with vendor “inContact” to obtain the dialer and set up a marketing
 26 system. Ex. 11. The contract included, among other things, the dialer and voice recording. *Id.*;
 27 *see also* Ex. 8.

1 To make the robocalls, Defendants obtained “business lead lists” from a third-party
 2 vendor, SalesGenie, which maintains a database of contact information for millions of
 3 businesses. Ex. 1 at 54:5 – 55:15; Ex. 13 at 15:22 – 16:03. The lists Defendants obtained
 4 included names, addresses, telephone numbers, and descriptions of the “type” of business
 5 listed. Ex. 14. Defendants could choose the state or states that they wanted to target as well as
 6 the type of businesses. Ex. 12. Defendants loaded telephone numbers from these lists into the
 7 dialer. Ex. 1 at 66:15 – 67:3; Ex. 15 at 54551 (noting “30k” new leads were uploaded). The
 8 dialer then automatically called numbers on the list and played the following recorded message
 9 when it connected:

10 Google, yes Google has approved your business for a new
 11 mobile marketing system. To take advantage of this new
 12 exciting program press one. To be removed from the list and
 give the spot to your competitor, press two.

13 Ex. 16 at 817. When a potential customer pressed “one” he or she was connected to a sales
 14 representative who provided information regarding Defendants’ services. *See id.*; Ex. 1 at
 15 79:19 – 80:13; Ex. 8 at 758 – 59. Plaintiff Booth testified that after he pressed “one” he spoke
 16 to a sales representative who provided information about Appstack products. Ex. 17 at 48:2 –
 17 49:1.

18 2. Defendants Did Not Obtain Potential Customers’ Consent Before Placing the
 19 Calls

20 Call recipients never consented to receive robocalls from Defendants. Indeed, when
 21 asked during discovery whether the persons to whom Appstack placed calls ever consented to
 22 receive the calls Appstack placed, Appstack responded that customers consented to the calls
 23 after they received the calls by pressing the option for more information. Ex. 9 at 9–10.

24 According to its senior director Chris Fruehwald, Sales Genie also did not obtain consent to
 25 accept robocalls from the parties it included on its lead lists. Ex. 18 at 8:12 – 9:1. When
 26 deposed, Plaintiff Booth confirmed that he had no prior relationship or interaction with
 27 Appstack before receiving the calls. Ex. 17 at 42:23 – 43:03.

1 Not surprisingly, call recipients repeatedly complained about to Defendants about
 2 unwanted robocalls. *See* Ex. 7 at 54525 (“I am now utterly turned off by a) AppStack’s
 3 repeated and unwanted targeting of my business phone despite repeated requests to get my
 4 name off the list; and b) unheard of arrogant treatment by your employees that could be
 5 described as nothing short of atrocious.”); Ex. 7 at 54535 (“One of our own employees got
 6 stuck on our own call list and is annoyed by it. Can we please stop using VMB?”). Still, the
 7 calls continued. *See* Ex. 7 at 54537 (“We can not stop using VMB. It generates plenty of
 8 revenue to justify it”); Ex. 1 at 69:24 – 71:8 (defining VMB as a prerecorded message).
 9 Indeed, when Mr. Ricci expressed concern about the dialer, “upper management” told him that
 10 “if we are making sales, then, you know, let’s continue [using the dialer].” Ex. 1 at 39:15 –
 11 42:4.

12 3. Defendants Robocalled Millions of Potential Customers Including Plaintiffs

13 Plaintiff Monty Booth owns a small law firm located in Everett, Washington, where he
 14 operates as a solo practitioner with no administrative staff. Ex. 17 at 10:07–23. Between May
 15 3 and June 20, 2013, Booth received seventeen robocalls from Appstack on his business
 16 landline in Everett. Ex. 19 ¶ 14. Some days, he received multiple calls, up to four in a single
 17 business day. Ex. 17 at 20:07–16; 28:01–03.

18 Plaintiff Booth had no prior relationship with Defendants and never requested that
 19 Appstack contact him. *Id.* at 42:23 – 43:03. Just as it did for other potential customers,
 20 Defendants acquired Booth’s number from the list of leads it obtained from Sales Genie. Ex.
 21 14. And, as with potential customers, Defendants called Booth using the automatic dialer and
 22 played a solicitation message. Ex. 17 at 32:3–6; 48:2– 11. After receiving the calls, Plaintiff
 23 Booth contacted counsel because he “wanted the harassment to stop.” *Id.* at 36:22 – 37:2.

24 Defendants also placed unsolicited robocalls to potential customers’ cellular telephones,
 25 including Washington residents Ricardo Macarenas and Christopher Gregory. *See* Macarenas
 26 Decl. ¶ 6; Gregory Decl. ¶ 6. Plaintiff Booth has filed a motion for leave to amend to add Mr.
 27

1 Macarenas and Mr. Gregory as named plaintiffs and seek their appointment as class
 2 representatives of both the Washington class and a national class seeking statutory damages
 3 under the TCPA. Both Mr. Macarenas and Mr. Gregory understand the responsibilities of
 4 being a class representative and are willing and able to perform them. *See* Macarenas Decl. ¶
 5 8; Gregory Decl. ¶ 9.

6 Plaintiffs were not alone. As explained in more detail below, Plaintiffs' expert has
 7 determined that during the time they used the dialer, Defendants placed 3,843,080 robocalls to
 8 571,914 unique numbers nationwide, including 601,207 calls to 90,163 unique cellular
 9 telephones, and 69,130 calls to 11,192 unique telephone numbers in Washington State.
 10 Declaration of Jeffrey A. Hansen ("Hansen Decl.") ¶ 12.

11 **C. Class Members Can Be Identified Using Defendants' Call Records, Reverse Look-
 12 Up Directories, and Billing Records**

13 Defendants' call records contain detailed information about each call made by the
 14 dialer, including the number it called, the date called, call start time, the length of the call, and
 15 the originating number. Ex. 14. Plaintiffs initially retained call data expert, Jeffrey A. Hansen,
 16 to analyze and evaluate Defendants' call data to determine (1) the total number of calls that
 17 Defendants made to landlines and cellphones respectively; and (2) the total number of unique
 18 landline and cellphone numbers that were called both nationally and statewide. Hansen Decl. ¶
 19 4, Ex. 2. Plaintiffs subsequently asked Mr. Hansen to provide a method for identifying the
 20 physical location or termination point of a call made to telephones other than hardwire
 21 landlines; and (2) reanalyze the call data to exclude those calls that do not appear to have been
 22 answered and where no voice mail message was left. *Id.* ¶ 5.

23 The following chart summarizes Mr. Hansen's conclusions regarding the total number
 24 of calls that Defendants placed after Mr. Hansen excluded calls where the duration of the call
 25 indicated that it was likely the call was not answered and no recorded voice message was left:
 26
 27

	LANDLINES	CELLULAR	TOTAL
Nationwide Total Calls Made	3,241,873	601,207	3,843,080
Nationwide Unique Numbers Called	481,751	90,163	571,914
Average Call Per Unique Number	6.7	6.7	6.7
Washington Total Calls Made	53,665	15,465	69,130
Washington Unique Numbers Calls	8,861	2,331	11,192
Average Call Per Unique Number	6.1	6.6	6.2

The above chart only includes calls placed to numbers with Washington area codes. Because some types of phone numbers are portable (i.e., cellular telephones, soft phones, and VOIP (voice over internet protocol)), the area code alone may not indicate whether the call was physically received in Washington. Hansen Decl. ¶ 7. However, according to Mr. Hansen, the physical location of where a call terminated can be determined through a two-step process. *Id.* ¶ 8. First, using a “reverse look-up directory” the address for the business associated with the phone can be determined. *Id.* ¶ 9–10. Second, the billing records of the identified businesses can be reviewed to determine the physical location of the telephone when it was answered. *Id.*

III. THE PROPOSED CLASSES

Plaintiffs seek to certify a Washington class defined as:

All Washington businesses who received one or more telephone calls made by Defendants and/or made on Defendants’ behalf using an automatic dialing and announcing device, when such a call included a pre-recorded message containing a commercial solicitation and was transmitted to a telephone number with a Washington State area code at any time for the period that begins four years from the date of this Complaint to trial.

Plaintiffs Macarenas and Gregory seek to certify a national class defined as:

1 All persons or entities in the United States who, on or after four
 2 years before the filing of this action, received a call on their
 3 cellular telephone line with a pre-recorded message, made by or
 on behalf of Defendants, and without the recipient's express
 prior consent.

4 Excluded from the classes are Defendants, any entity in which Defendants have a
 5 controlling interest or that has a controlling interest in Defendants, and Defendants' legal
 6 representatives, assignees, and successors. Also excluded are the judge to whom this case is
 7 assigned and any member of the judge's immediate family.

8 **IV. ARGUMENT AND AUTHORITY**

9 **A. Plaintiffs Satisfy the Standards for Class Certification**

10 To achieve certification, a proposed class must meet the four threshold requirements of
 11 Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of
 12 representation. Fed. R. Civ. P. 23(a); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir.
 13 2013). In the present case, Plaintiffs seek certification under Rule 23(b)(3), which requires that
 14 "questions of law or fact common to class members predominate over any questions affecting
 15 only individual members, and that a class action is superior to other available methods for fairly
 16 and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *Erica P. John Fund,*
 17 *Inc. v. Haliburton*, —U.S.—, 131 S.Ct. 2179, 2184 (2011). Although in some cases the court
 18 may have to "probe behind the pleadings" to determine whether the plaintiffs have met the
 19 requirements of Rule 23, "[m]erits questions may be considered to the extent—but only to the
 20 extent—that they are relevant to determining whether the Rule 23 prerequisites for class
 21 certification are satisfied." *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, —U.S.—,
 22 133 S.Ct. 1184, 1194–95 (2013) (citations omitted); *see also Jimenez v. Allstate Ins. Co.*, 765
 23 F.3d 1161, 1166, n.*5 (9th Cir. 2014).

24 Courts in the Ninth Circuit and elsewhere frequently certify classes involving unlawful
 25 robocalls. *See, e.g., Whitaker v. Bennett Law, PLLC*, No. 13-cv-3145-L(NLS), 2014 WL
 26 5454398, at *7 (S.D. Cal. Oct. 27, 2014) (certifying class of individuals to whom automated
 27

debt collection calls were placed to cellular telephones); *Stemple v. QC Holdings, Inc.*, No. 12-cv-01997-AS(WVG), 2014 WL 4409817, at *10 (S.D. Cal. Sept. 5, 2014) (certifying Rule 23(b)(3) class of individuals who were called by defendant for the purpose of collecting a debt); *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 2014 WL 1256035, at *10 (D. Nev. March 26, 2014) (certifying nationwide class of individuals who allegedly received text messages in violation of the TCPA); *Birchmeier v. Caribbean Cruise Line, Inc.*, -- F.R.D. --, 2014 WL 3907048, at *13 (N.D. Ill. Aug. 11, 2014) (certifying two litigation classes for automated calls made to either a cellphone or landline that advertised free cruises in exchange for participation in various surveys); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 693 (S.D. Fla. 2013) (certifying a litigation class comprising of all Florida residents who had received an automated telephone call on their cellphone seeking to collect an alleged medical debt); *Knutson v. Schwan's Home Serv., Inc.*, No. 3:12-cv-0964, 2013 WL 4774763, *11 (S.D. Cal. Sept. 5, 2013) (certifying class of persons who received autodialed calls with a prerecorded message on their cell phones); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 572 (W.D. Wash. 2012) (certifying litigation class of cell phone owners who received text messages promoting the defendant's pizza products); *Mitchem v. Ill. Collection Serv., Inc.*, 271 F.R.D. 617, 620 (N.D. Ill. 2011) (certifying litigation class consisting of all persons who received a prerecorded voice message seeking to collect debt for medical services on their cellphones).

1. The Numerosity Standard is Met

The numerosity requirement is met when “the class is so numerous that joinder of all members is impractical.” Fed. R. Civ. P. 23(a)(1). Numerosity has been held presumptively satisfied when a proposed class comprises forty or more members. *See McCluskey v. Trs. of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673–74 (W.D. Wash. 2010). Classes that number in the thousands typically satisfy this requirement. *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646–47 (W.D. Wash. 2007) (finding numerosity requirement

1 satisfied in TCPA junk fax case involving the transmission of 3,000 unsolicited faxes); *Agne*,
 2 286 F.R.D. at 567 (finding class of 68,000 class members satisfied numerosity standard);
 3 *Heastie v. Cmty. Bank of Greater Peoria*, 125 F.R.D. 669, 674 (N.D. Ill. 1989) (recognizing
 4 that classes numbering in the thousands “clearly” satisfy the numerosity requirement).

5 Plaintiffs’ proposed Washington class includes 11,219 unique Washington small
 6 businesses who received calls from Defendants. Hansen Decl. ¶ 12. Plaintiffs’ national class
 7 includes 90,163 members. *Id.* Numerosity is satisfied.

8 2. The Commonality Standard is Met

9 The second threshold to certification requires that “there are questions of law or fact
 10 common to the class.” Fed. R. Civ. P. 23(a)(2). To satisfy this element, the plaintiff must
 11 allege a “common contention of such a nature that it is capable of class-wide resolution, which
 12 means that determination of its truth or falsity will resolve an issue that is central to the validity
 13 of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551
 14 (2011). In other words, “[w]hat matters to class certification is not the raising of common
 15 ‘questions’ — even in droves — but rather, the capacity of a classwide proceeding to generate
 16 common answers apt to drive the resolution of the litigation. *Id.* (internal marks and citation
 17 omitted; emphasis in original); *see also Jimenez*, 765 F.3d at 1165 (noting commonality does
 18 not turn on the number of common questions, but on their “relevance to the factual and legal
 19 issues at the core of the purported class’ claims”). A “single *significant* question of law or fact”
 20 satisfies the commonality requirement. *Abdullah v. U.S. Sec. Assoc., Inc.*, 731 F.3d 952, 957
 21 (9th Cir. 2013) (quotation omitted and emphasis in original).

22 Courts routinely find commonality where the class’s claims arise from a uniform course
 23 of conduct on the part of the defendant. *See Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 756
 24 (7th Cir. 2014) (finding that “where the same conduct or practice by the same defendant gives
 25 rise to the same kind of claims from all class members, there is a common question”); *see also*
 26 *Agne*, 286 F.R.D. at 567 (recognizing that where the plaintiff alleged that “all class members
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1 were sent substantially similar unsolicited text messages by the same defendants, using the
2 same automatic dialing technology, commonality is satisfied”).

3 The essence of Plaintiffs’ claims is that Defendants used an autodialer to place
4 thousands of commercial solicitations to the class members without their consent in violation of
5 the WADAD and the TCPA. Determining liability on these claims raises numerous common
6 questions of law and fact, including: (1) whether Defendants used an autodialer to send
7 commercial solicitations to Washington residents in violation of the WADAD; (2) whether
8 Defendants used an autodialer to send commercial solicitations to class members’ cell phones
9 in violation of the TCPA; (3) whether the calls at issue constitute commercial solicitations
10 within the meaning of the WADAD and TCPA; (4) whether class members consented to
11 receiving the solicitations at issue; and (5) whether Defendants Espinosa and Zdanowski are
12 vicariously liable for Appstack’s conduct. *See Whitaker*, 2014 WL5454398 at *5 (holding
13 commonality satisfied where the core issue was whether the defendant used an ATDS or
14 prerecorded or artificial voice to make unsolicited calls); *Kristensen*, 2014 WL 1256035 at *8
15 (finding vicarious liability issues satisfied commonality because the issue “turns on the federal
16 common law of agency and can arise from actual authority, apparent authority, or ratification”
17 a determination of which will depend on the defendants’ conduct rather than class members);
18 *Stern v. DoCircle, Inc.*, No. 12-cv-2005, 2014 WL 486262, at *4 (C.D. Cal. Jan. 29, 2014)
19 (finding consent is a legal issue common to all class members). Due to the numerous common
20 questions of law and fact among the proposed classes, the commonality requirement is
21 satisfied.

22 3. The Typicality Standard is Met

23 Typicality is satisfied if “the claims or defenses of the representative parties are typical
24 of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). “The purpose of the typicality
25 requirement is to assure that the interest of the named representative aligns with the interests of
26 the class.” *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). “The test of
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1 typicality is whether the other members have the same or similar injury, whether the action is
 2 based on conduct which is not unique to the named plaintiffs, and whether other class members
 3 have been injured in the same course of conduct.” *Ellis v. Costco Wholesale Corp.*, 657 F.3d
 4 970, 984 (9th Cir. 2011). “The Ninth Circuit does not require the named plaintiff’s injuries to
 5 be identical with those of the other class members, but only that the unnamed class members
 6 have injuries similar to those of the named plaintiff’s and that the injuries result from the same
 7 injurious course of conduct.” *Hanon*, 976 F.2d at 666 (question and internal marks omitted).

8 Courts have found typicality where, as here, a defendant’s practice of making the same
 9 unsolicited contact to plaintiff and the proposed class formed the basis of the class’s claim. *See*
 10 *Whitaker*, 2014 WL 5454398 at *5 (finding typicality satisfied because each class member’s
 11 claim “revolves exclusively around [the defendant’s] conduct as it specifically relates to the
 12 alleged violations of the TCPA”); *Agne*, 286 F.R.D. at 569 (recognizing that the plaintiff’s
 13 claims were typical where they arose from the same marketing campaign and were executed in
 14 the same manner as other class members).

15 In this case, Plaintiffs’ claims are premised on precisely the same conduct as the claims
 16 of the members of the proposed classes. Plaintiffs and proposed class members each received
 17 ADAD calls from Defendants, each call was made with the same technology, included a
 18 prerecorded message, and was made for the purpose of soliciting business. Thus, Plaintiffs’
 19 claims under the WADAD arise out of the same course of conduct, are based on the same legal
 20 theory, and resulted in the same injury as the claims of the proposed Washington class.
 21 Accordingly, the typicality requirement is satisfied. The same is true for Mr. Mascarenas, Mr.
 22 Gregory, and the proposed national class.

23 4. The Class is Adequately Represented

24 The final Rule 23(a) prerequisite requires that the representative parties have and will
 25 continue to “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4).
 26 This factor has two components. First, the named representatives must appear able to prosecute
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1 the action vigorously through qualified counsel, and second, the representatives must not have
 2 antagonistic or conflicting interests with the unnamed members of the class. *Lerwill v. Inflight*
 3 *Motion Pictures*, 582 F.2d 507, 512 (9th Cir. 1978).

4 Here, Plaintiffs have the same interests as the proposed class members— all have
 5 received robocalls from Defendants without their request. Plaintiff Booth already has actively
 6 participated in the litigation by responding to discovery, appearing at a deposition, and
 7 otherwise assisting counsel in their prosecution of this case. Mr. Mascarenas and Mr. Gregory
 8 understand the responsibilities of a class representative and are willing and able to actively
 9 participate in the action. Mascarenas Decl. ¶ 8; Gregory Decl. ¶ 9. Plaintiffs do not have any
 10 interests that are antagonistic to the interests of the proposed class.

11 Proposed class counsel regularly engage in major complex litigation, and have
 12 extensive experience in consumer class action lawsuits involving automated calling. Terrell
 13 Decl. ¶¶ 2–5, 13–14. Proposed class counsel have been appointed as class counsel in many
 14 complex consumer class actions and have been appointed as class counsel for numerous cases
 15 litigating violations of federal and state laws regulating automated calling. *Id.* Thus, the
 16 adequacy requirement is satisfied. *See, e.g., Whitaker*, 2014 WL 5454398 at *6 (finding
 17 adequacy satisfied where plaintiff’s counsel served as counsel for “various successful TCPA
 18 actions in the past”).

19 **B. Plaintiffs Satisfy the Requirement of Rule 23(b)(3)**

20 Class certification is appropriate under Rule 23(b)(3) if “questions of law or fact
 21 common to the members of the class predominate over any question affecting only individual
 22 members, and . . . a class action is superior to other available methods for the fair and efficient
 23 adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). For the reasons set forth below,
 24 Plaintiffs satisfy these requirements.

1 1. Common Issues Predominate

2 The Ninth Circuit recently noted that “[a] principal purpose behind Rule 23 class
3 actions is to promote efficiency and economy of litigation.” *Abdullah*, 731 F.3d at 963–64
4 (quotation and internal marks omitted). Therefore, “The predominance analysis under Rule
5 23(b)(3) focuses on the relationship between the common and individual issues in the case and
6 tests whether the proposed class is sufficiently cohesive to warrant adjudication by
7 representation.” *Id.*; see also *Kristensen*, 2014 WL 1256035 at *8 (noting “[t]he focus [of the
8 predominance inquiry] is on the relationship between the common and individual issues”)
9 (citation omitted); *Whitaker*, 2014 WL 5454398 at *6 (holding predominance satisfied where
10 the claims were brought pursuant to the TCPA, which the court defined as a “narrow statute
11 with explicit confines defining both liability and available damages”).

12 Considering whether questions of law or fact common to class members predominate
13 begins, of course, with the elements of the underlying cause of action.” *Abdullah*, 731 F.3d at
14 964. The focus of this case is on common legal and factual questions regarding the lawfulness
15 of Defendants’ commercial solicitations. The company’s widespread course of conduct raises
16 questions that are common to the classes and that predominate over any questions affecting
17 only individual members, making certification under Rule 23(b)(3) appropriate for each of
18 Plaintiffs’ claims.

19 a. *WADAD claim*

20 The elements of Plaintiffs’ WADAD claim are threefold. At trial, Plaintiffs must prove
21 that Defendants: (1) used an automatic dialing and announcing device, (2) for purposes of
22 commercial solicitation, and (3) intended the solicitations to be received by telephone
23 customers in Washington. See RCW 80.36.400(2). In addition, Plaintiffs must establish that
24 the individual Defendants, Steve Espinosa and John Zdanowski, are directly or vicariously
25 liable for the unlawful calls. All of these issues can be established for each and every class
26 member using common proof.

1 Defendants have admitted that between March and November 2013 they used an
 2 automatic dialing and announcing device, which the WADAD defines as “a device which
 3 automatically dials telephone numbers and plays a recorded message once a connection is
 4 made” (RCW 80.36.400(1)(a)), to promote their products. *See* Ex. 10. Defendants’ business
 5 records confirm that Defendants used an automatic dialing and announcing device to place calls
 6 to businesses and play a recorded message once a connection was made. *See* Section II.B.1.
 7 Thus, whether or not Defendants used an automatic dialing and announcing device is an
 8 undisputed and common question that can be established on a classwide basis, probably on
 9 summary judgment.

10 Common proof also establishes that Defendants placed the calls “for purposes of
 11 commercial solicitation.” The WADAD defines “commercial solicitation” as “the unsolicited
 12 initiation of a telephone conversation for the purpose of encouraging a person to purchase
 13 property, goods, or services.” RCW 80.36.400(1)(b). Where calls are “aimed at encouraging
 14 listeners to engage in future commercial transactions ... to purchase [a company’s] goods,”
 15 they constitute “commercial solicitations” for purposes of the WADAD. *Chesbro v. Best Buy*
 16 *Stores, L.P.*, 705 F.3d 913, 919 (9th Cir. 2012) (reversing trial court’s grant of summary
 17 judgment and finding courtesy messages alerting customers that coupons entitling them to
 18 discounts on future purchases were about to expire constitute “commercial solicitations” for
 19 purposes of the WADAD); *see also Meilleur v. AT&T, Inc.*, No. C11-1025 MJP, 2011 WL
 20 5592647, at *6 (W.D. Wash. Nov. 16, 2011) (holding an unsolicited message placed by an
 21 automatic dialing and announcing device which asks the recipient to return the call initiates a
 22 telephone conversation and therefore falls within the definition of “commercial solicitation”
 23 under RCW 80.36.400(1)(b)).

24 Here, Defendants have admitted that they used an automatic dialing and announcing
 25 device for the purpose of “promoting” their products. Ex. 10. The recorded message the dialer
 26 left encouraged potential customers to “take advantage” of Defendants’ services by “pressing
 27

one.” Ex. 16. When potential class members pressed one, they were immediately connected to an Appstack sales representative. *See id.*; Ex. 1 at 79:19–80:13; Ex. 8 at 758–59. Plaintiffs’ expert has identified and excluded any calls that were of such short duration that it appears the calls were not answered and the recorded message not played. Hansen Decl. ¶ 12.

Defendants’ business records further confirm that Defendants placed the autodialed calls for marketing purposes. Section II.B.1, *supra*. No proposed class member could have “solicited” the calls because Defendants obtained class members’ contact information from a third party’s calling lists which admits it had no prior existing business relationship with the numbers entered into the dialer. *See* Ex. 18 at 8:12 – 9:1. This common evidence establishes the “commercial solicitation” element of Plaintiffs’ WADAD claim.

The third element of the WADAD claim — that the calls were intended to be received by telephone customers in Washington State — also can be established on a classwide basis using common proof. Defendants targeted for marketing purposes brick-and-mortar businesses located within Washington State. Ex. 12. Call records indicate that Defendants called 11,192 numbers with Washington area codes. Hansen Decl. ¶ 12. Such common evidence shows that Defendants “intended” the calls to be received by telephone customers in Washington. RCW 80.36.400(2) (providing that the statute applies “to all commercial solicitation intended to be received by telephone customers within the state”).

To establish that they are entitled to damages, Plaintiffs and proposed Washington class members may be required to demonstrate that they physically received the unlawful calls in Washington. This can be accomplished on a classwide basis by using “reverse look-up” directories to identify the address associated with the telephone number and then obtaining the telephone billing records from the identified businesses. *See* Hansen Decl. ¶¶ 6–11. Individualized proceedings are not necessary.

Finally, common proof will show that Defendants Espinosa and Zdanowski are liable — either directly or vicariously — for Defendants’ unlawful conduct. Although no court has

1 addressed whether corporate officers can be held directly liable for violations of the WADAD,
 2 under the analogous TCPA, corporate officers who directly participate in or authorize conduct
 3 that violates the TCPA may be held personally liable, even if they took the allegedly unlawful
 4 actions on behalf of the company. *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 897 (W.D.
 5 Tex. 2001) (holding corporate officers and directors personally liable for TCPA violations
 6 where they had “direct, personal participation in or personally authorized the conduct found to
 7 have violated the statute”). Here, common evidence indicates that Defendants Espinosa and
 8 Zdanowski authorized and participated in Defendants’ unlawful marketing scheme. *See*
 9 Section II.A, *supra*. Thus, the issue is appropriate for class-wide adjudication.

10 Even if Defendants Espinosa and Zdanowski are not directly liable for violations of the
 11 WADAD, they may be “vicariously” liable. Vicarious liability “turns on the federal common
 12 law of agency and can arise from actual authority, apparent authority, or ratification.”
 13 *Kristensen*, 2014 WL 1256035 at *8. Therefore, the focus at trial will be on the relationship
 14 between the defendants “without concern for any conduct by the class members.” *Id.* (holding
 15 common issue of whether defendant was vicariously liable for unlawful text messages
 16 predominated at trial because the focus would be on defendants’ post-message behavior); *see*
 17 *also Joint Equity Comm. of Investors of Real Estate Partners v. Coldwell Banker Real Estate*
 18 *Corp.*, 281 F.R.D. 422, 433–34 (C.D. Cal. 2012) (holding common issues of vicarious liability
 19 predominated where individuals subsequently ratified unlawful practices).

20 The above common liability issues predominate over any individualized issues, of
 21 which there are none, because they focus on Defendants’ conduct. As for damages, the
 22 WADAD provides that “damages to the recipient of commercial solicitations made using an
 23 automatic dialing and announcing device are five hundred dollars.” RCW 80.36.400(3).
 24 Therefore, calculating damages will involve simply adding up the number of calls and
 25 multiplying the number by \$500. In such circumstances, certification is appropriate. *Leyva*,
 26 716 F.3d at 513 (holding district court abused its discretion by denying certification on the
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1 ground that individual damages calculations predominated over common liability questions
2 where damages could be mechanically calculated based on available records).

3 b. *CPA claim*

4 Washington's Consumer Protection Act ("CPA") provides that "[u]nfair methods of
5 competition and unfair or deceptive acts or practices in the conduct of any trade or commerce
6 are ... unlawful. RCW 19.86.020. Any person "who is injured in his or her business or
7 property" may bring a CPA claim. RCW 19.86.090. To prevail, a plaintiff must show: (1) an
8 unfair or deceptive act or practice; (2) in trade or commerce; (3) that impacts the public
9 interest; (4) which causes injury to the party in his business or property; and (5) which injury is
10 causally linked to the unfair or deceptive act. *See Hangman Ridge Training Stables, Inc. v.*
11 *Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531, 535 (1986). A person who establishes a
12 CPA claim is entitled to, among other things, the costs of bringing the suit, including
13 reasonable attorneys' fees. RCW 19.86.090. A statute may expressly provide that a violation
14 of the statute automatically satisfies some or all of the five CPA elements. *See id.* at 536.

15 The WADAD provides that "[a] violation of this section is a violation of [Washington's
16 Consumer Protection Act] chapter 19.86 RCW." A WADAD violation per se establishes all
17 five elements of a CPA claim. *See Gragg v. Orange Cab Co., Inc.*, 942 F. Supp. 2d 1111,
18 1117–18 (W.D. Wash. 2013) (citing the WADAD language as an example of how the
19 legislature can ensure that a statutory violation will per se establish all five elements of a CPA
20 violation).

21 Because a WADAD violation constitutes a per se violation of the CPA, Plaintiffs' CPA
22 claim does not raise any unique individualized issues that will predominate at trial. If Plaintiffs
23 prove a violation of the WADAD, then they will have proved their CPA claims and will be
24 entitled to the reasonable fees and costs they incur in bringing the action.

1 c. *TCPA claim*

2 To prevail on their TCPA claim, Mr. Macarenas and Mr. Gregory must establish (1) a
 3 telephone call, (2) using an automatic telephone dialing system or an artificial or prerecorded
 4 voice, (3) to any cellular or residential telephone service. *See* 47 U.S.C. § 227(b)(i)(A)(iii); 47
 5 U.S.C. § 227(b)(i)(B) and 47 CFR § 64.1200(a)(1)(iii); 47 CFR § 64.1200(a)(2). Each of these
 6 elements can be established using common evidence. Defendants have admitted they used an
 7 automatic telephone dialing system or an artificial or prerecorded voice to place calls to phone
 8 numbers with Washington area codes. Ex. 10. Call records indicate that Defendants placed
 9 hundreds of thousands of calls to cellular telephones nationwide. Hansen Decl. ¶ 12. The
 10 common issue that will predominate at trial is whether Appstack violated the TCPA by placing
 11 these calls and whether Defendants Espinosa and Zdanowski can be held directly or vicariously
 12 liable for the violations. *See Kristensen*, 2014 WL 1256035 at *8.

13 Unlike other TCPA cases, individualized issues of whether potential national class
 14 members “consented” to receive the calls will not predominate. The Ninth Circuit has held that
 15 in the absence of any evidence of consent by the defendant, consent is a common issue with a
 16 common answer. *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir.
 17 2012). “[C]ourts should ignore a defendant’s argument that proving consent necessitates
 18 individualized inquiries in the absence of any evidence that express consent was actually
 19 given.” *Kristensen*, 2014 WL 1256035, at *9 (citing *Meyer*). No evidence exists that even a
 20 single class member consented to receive the calls at issue in this case. To the contrary,
 21 common evidence shows that Defendants called people on lists that had been compiled by third
 22 party Sales Genie which does not verify consent during its data-gathering process. *See* Ex. 18
 23 at 8:12 – 9:01. Thus, common issues predominate with respect to Plaintiffs’ TCPA claims. *See*
 24 *Agne*, 286 F.R.D. at 569 (holding bare assertion of individualized issues of consent
 25 unsupported by a single document was insufficient to defeat predominance).

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2. A Class Action Is Superior

The Court should certify the classes if it finds that a “class action is superior to other available methods for fair and efficient adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). “A class action may be superior if class litigation of common issues will reduce litigation costs and promote greater efficiency, or if no realistic alternative exists.” *Connor v. Automated Accounts, Inc.*, 202 F.R.D. 265, 271 (E.D. Wash. 2001). A court must, in terms of fairness and efficiency, balance the merits of a class action against those of available alternatives methods of adjudication. *See id.*

Given the large number of class members, the small dollar value of their individual claims, and the multitude of common issues present, use of the class action device is the most efficient and fair means of adjudicating the claims that arise out of Defendants’ common course of unlawful telemarketing. Class treatment is superior to multiple individual suits or piecemeal litigation because it conserves judicial resources and promotes consistency and efficiency of adjudication. Additionally, it is likely that most class members lack the resources necessary to seek individual legal redress for Defendants’ misconduct and, without class treatment, would have no effective remedy for their injuries. *See Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (cases involving “multiple claims for relatively small individual sums” are particularly well suited to class treatment). Indeed, the attorneys working for Plaintiffs have had to spend hundreds of hours and thousands of dollars in expert fees obtaining the evidence necessary to prove that Defendants have engaged in unlawful conduct and that the victims of Defendants’ unlawful practices can be identified manageably from call records and other objective evidence.

3. This Case Is Manageable

One of the elements for determining the superiority of a class action in a particular case is manageability. *See* Fed. R. Civ. P. 23(b)(3). Because common issues predominate and individualized issues are absent, the trial of this action will be easily managed by the Court.

1 Plaintiffs will present generalized evidence of Defendants' common courses of unlawful
 2 conduct and the total number of robocalls received by class members. Defendants, of course,
 3 will have the opportunity to demonstrate that their common courses of conduct did not violate
 4 the law.

5 **C. Constitutionally Sound Notice Can Be Provided to Class Members**

6 To protect the rights of absent class members, the Court must provide them with the
 7 best notice practicable when it certifies a class under Rule 23(b)(3). Fed. R. Civ. P. 23(c)(2).
 8 The best practicable notice is that which is "reasonably calculated, under all the circumstances,
 9 to apprise interested parties of the pendency of the action and afford them an opportunity to
 10 present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314
 11 (1950).

12 Here, Defendants' call data identifies the unique telephone numbers of the classes that
 13 Plaintiffs seek to certify. *See generally* Hansen Decl. Consequently, the classes may be readily
 14 identified by using "reverse look-up" technology. *See G.M. Sign, Inc. v. Finish Thompson,*
 15 *Inc.*, No. 07 C 5953, 2009 WL 2581324, *4 (N.D. Ill. Aug. 20, 2009) (finding TCPA class
 16 sufficiently identifiable because "[plaintiff] may use the log and fax numbers to 'work
 17 backwards' to locate and identify the exact entities to whom the fax was sent"); *see also CE*
 18 *Design Ltd. v. Cy's Crabhouse North, Inc.*, 259 F.R.D. 135, 141 (N.D. Ill. 2009) (finding class
 19 sufficiently identifiable in a TCPA fax case through reference to fax numbers on transmission
 20 logs). As a result, notice may be sent directly via First Class mail to the class members.

21 Notice can also be published on a website maintained and updated by Plaintiffs'
 22 counsel. Class members will be able to use the site to stay apprised of important dates and to
 23 access the notice form and other key documents. Together, these approaches will provide the
 24 best practicable notice to the class members. After certification is granted, Plaintiffs will
 25 submit a detailed notice plan and form to the Court.

D. The Court Should Appoint TMDW and Mr. Gallagher as Class Counsel

Under Rule 23, “a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court must consider counsel’s: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

TMDW and Mr. Gallagher have diligently investigated Plaintiffs’ claims and have devoted, and will continue to devote, ample time and resources to this litigation. Terrell Decl. ¶ 15. As discussed above, TMDW and Mr. Gallagher have considerable experience with similar class action litigation and have been appointed class counsel in analogous consumer class actions regarding the TCPA. *See id.* ¶ 3. TMDW and Mr. Gallagher also have an in-depth knowledge of the applicable law, having been involved both in WADAD litigation and litigation arising from violations of the TCPA. *See id.* ¶¶ 3–5. Accordingly, the Court should appoint Beth Terrell, Mary Reiten, and Whitney Stark of TMDW, and Daniel Gallagher of the Law Offices of Daniel Gallagher to serve as class counsel for the proposed class pursuant to Rule 23(g).

V. CONCLUSION

For the reasons discussed above, the requirements of Rule 23 are satisfied. Plaintiffs respectfully requests that the Court enter an order certifying the proposed class pursuant to Rule 23(b)(3), appointing Beth Terrell, Whitney Stark, Mary Reiten and Dan Gallagher as class counsel, and ordering that notice of the action be sent to class members.

1 RESPECTFULLY SUBMITTED AND DATED this 14th day of November, 2014.

2 TERRELL MARSHALL DAUDT & WILLIE PLLC

3
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CERTIFICATE OF SERVICE

I, Mary B. Reiten, hereby certify that on November 14, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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